

[Blake v. Hatfield Electric Co.](#), 87-ERA-4 (ALJ Aug. 13, 1987)

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**U.S. DEPARTMENT OF LABOR**  
Office of Administrative Law Judge  
525 Vine Street, Suite 900  
Cincinnati, Ohio 45202

DATE: August 13, 1987  
CASE NO.: 87-ERA-4

IN THE MATTER OF

ARLEY BLAKE  
Complainant

v.

HATFIELD ELECTRIC COMPANY  
Respondent

Michael O'Brien, Esq.  
Edward J. Enichen, Esq.  
For the Complainant

Peter DeBruyne, Esq.  
For the Respondent

BEFORE: CHARLES W. CAMPBELL  
Administrative Law Judge

**RECOMMENDED DECISION**

This is a proceeding under the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. § 5801, *et seq.*, and its implementing regulations, 29 CFR part 24. Forty-two U.S.C. § 5801 sets forth the Policy and purposes of the ERA, including to assure public health and safety." The specific provision of the ERA involved in this case is 42 U.S.C. § 5851, which states in pertinent part as follows:

§ 5851. Employee Protection

(a) Discrimination against employee. No employer, including a commission licensee, or a contractor or a subcontractor of a commission licensee or applicant,

may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms,

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conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) ---

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

(b) Complaint, filing and notification. (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide

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compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

Arley Blake, the complainant ("Blake"), at times relevant to this case was employed by the respondent, Hatfield Electric Company ("HECO"), as a quality control ("QC") inspector. HECO was and is a large electrical contractor which, during the time of Blake's employment, was engaged in the construction of the Byron Nuclear Plant No. 6 at Byron, Illinois as a subcontractor for Commonwealth Edison Company ("CECO"), a

licensee of the Nuclear Regulatory Commission ("NRC"). Blake's employment was terminated by HECO on September 12, 1986 pursuant to a reduction-of-force ("ROF").

Following proper notice, a hearing was held before me in Rockford, Illinois during the period February 17, 1987 to March 6, 1987, at which the parties were afforded opportunity to present evidence and argument. Post-hearing briefs were filed by both parties, reply briefs were filed on June 10, 1987 and the respondent filed errata on June 12, 1987.<sup>1</sup>

## ISSUES<sup>2</sup>

The parties agree that the following issues are present in this case:

(a) Whether Blake was selected for ROF termination by HECO as a QC inspector at the Byron Nuclear Plant No. 6 on September 12, 1986, by reason of his activities protected under the ERA (or contrarily for cause), which issue includes the following sub-issues:

(i) Whether, as a matter of law, Blake's activities protected under 42 U.S.C. § 5851 include his actions in processing "internal" documents, such as DR's, NCR's and OIR'S,<sup>3</sup>

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with HECO and CECO (*Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (ERA case); *Phillips v. Department of Interior Board of Mine Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938, (1975) or whether his only activities protected by the ERA were his participation in the NRC formal investigation of HECO in the summer of 1986 under Docket Nos. 50-454 and 50-455 ("the NRC investigation") and his participation as a witness on August 19, 1986, in a case under the ERA styled as *John B. Spencer v. Hatfield Electric Co.*, Case No. 86-ERA-33, U. S. Department of Labor ("the Spencer case"). See *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).

(ii) Whether, as a matter of law, Blake's claim is barred because Blake is required to exhaust collective-bargaining grievance procedures and whether this Court's jurisdiction is preempted by 29 U.S.C. § 185.

(iii) Whether, as a matter of fact, Blake was selected for ROF termination (a) because of his processing and filing of such internal documents, (b) because of his participation in the NRC investigation and/or because of his participation in the Spencer case.

(b) Whether Blake's written evaluation on September 3, 1986, by HECO's Assistant QC Supervisor Dan McCarty was performed in good faith without reference to his ERA protected activities or in bad faith as a pretext to terminate Blake by reason of his ERA protected activities.

(c) Whether, if Blake shows that HECO's illegal motive "played some part in the discharge," HECO can sustain its burden of proving that Blake would have been discharged even if he had not engaged in protected conduct. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1161 79th Cir. 1984).

In addition to the issues listed above, Blake contends that the following issues are also a part of this case:

(a) Whether, as a matter of law, Blake's activities protected under 42 U.S.C. § 5851 include his actions in insisting

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upon strict adherence to written QC procedures.

(b) Whether, as a matter of fact, he was selected for termination because of his actions in insisting upon strict adherence to written QC procedures.

(c) Whether HECO was generally hostile towards diligent QC inspectors.

(d) Whether HECO was generally hostile towards inspectors assisting the NRC investigation and/or the Spencer case.

(e) Whether Blake was one of the best QC inspectors employed by HECO at the time of his layoff as evidenced by his and fellow workers' opinions, his and others' certification and test scores and his and others' prior evaluations by HECO.

(f) Whether Blake was selected for termination prior to other less qualified, less experienced, less knowledgeable employees.

(g) Whether HECO's assertions of Blake's alleged "bad attitude" as a supposedly legitimate "dual motive" for Blake's termination will require "affirmative action to abate the violation" by the Secretary under 42 U.S.C. § 5851(b)(2)(B) to protect the integrity of any reinstatement order entered by the Court. *See, e.g., DeFord v. Secretary of Labor*, 700 F.2d 281, 289 (6th Cir. 1983) (understandable "mistrust" of employer must be considered in fashioning appropriate reinstatement relief). HECO contends that the following additional issues are in dispute:

(a) Whether to sustain his burden of proof, Blake must prove: (i) he engaged in protected activity, (ii) HECO's knowledge of Blake's protected activity, (iii) HECO's animus toward Blake's engagement in protected activity, and (iv) causation of Blake's layoff on September 12, 1986 by HECO's animus towards Blake's known protected activity. *See, e.g., DeFord v. Secretary of Labor*, 700 F.2d 281, 285 (6th Cir. 1983), and *Morris, the Developing Labor Law* (2nd Ed).<sup>4</sup>

(b) Whether Blake may rely upon evidence preceding September 2, 1986 to establish a violation of the Energy

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Reorganization Act, 42 U.S.C. SS 5851. See 42 U.S.C. § 5851(b)(1).<sup>5</sup>

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I

The following findings of fact and conclusions of law are based upon the entire record of this case and the applicable law. Where appropriate, consideration has also been given to my observation of the appearance and demeanor of the witnesses. Each exhibit in the record has been carefully considered, whether or not it is mentioned in this recommended decision<sup>6</sup>.

The position and function of quality control inspectors such as Blake in the present case were described by the United States Court of Appeals for the Ninth Circuit in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 at 1163 191

Quality control inspectors play a crucial role in the NRC's regulatory scheme. The NRC regulations require licensees and their contractors and subcontractors to give inspectors the "authority and organizational freedom" required to fulfill their role as independent observers of the construction process. 10 C.F.R. Part 50, App. B. at 413. In a real sense, every action by quality control inspectors occurs "in an NRC proceeding," because of their duty to enforce NRC regulations. At times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.

In *Kansas City Gas & Electric Company v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 3331 (1986), the court quoted with approval from the *Mackowiak* decision and added:

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In effect, such a [properly functioning licensee quality assurance program] serves as the eyes and ears of the NRC because the inspectors are always on site and take over much of the inspection burden from federal personnel. *In the Matter of Consumers Power Co.*, 7 AEC 7, 11 (1974). The observations and judgments of quality assurance personnel on potential construction deficiencies are documented and that documentation is preserved and facilitates NRC audits. 780 F.2d at 1507.<sup>7</sup>

Although the quality control inspectors function as the "eyes and ears of the NRC," as noted in *Kansas City Gas & Electric Company*, it appears to be accepted practice for them to be employees of the same company whose construction work they are inspecting. As noted in the above excerpt from *Mackowiak*, this circumstance can have the result that at times "the inspector may come into conflict with his employer by identifying problems that might cause additional expense and delay."

Robert B. Klingler, the project quality control supervisor for CECO at the Byron nuclear power plant, who has bachelor's and master's degrees in electrical engineering, testified that CECO relied on inspectors to report improper procedures in the course of carrying out its quality assurance audits (Tr. 1945-1947). The following question and answer occurred during Klingler's testimony:

- Q. When you hire an inspector in the quality assurance program, isn't it correct that you want these guys to be capable, inquisitive, honest and not afraid to speak their mind when they think they have seen a discrepancy that should be reported?
- A. That is the man I want to work for me. That is what we want. (Tr. 1948-1949)

It is clear from the holdings in *Mackowiak* and *Kansas City Gas & Electric Company* that the quality control inspector's independence is an attribute necessary in carrying out the stated

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purpose of the ERA to assure the public health and safety. Given the situation where, as here, the quality control inspector at a nuclear plant is an employee of the contractor whose work he is inspecting, he must rely in large part for protection of that independence on the employee protection provisions of § 5851 of the ERA, including the provisions which authorize proceedings such as the present one. It is essential to the integrity of such proceedings that other employees be free to testify without fear of retaliation from the management of the respondent, and it is noted that such retaliation is specifically prohibited by § 5851.

Certain issues can be addressed at this point. First, I find persuasive the reasoning of *Mackowiak v. University Nuclear Systems, Inc.* and *Kansas City Gas & Electric Company v. Brock* that an employee's actions in processing internal documents are protected activity under the ERA. As the *Kansas City* court stated, the quality assurance program and its inspectors are "the eyes and ears of the NRC."

Secondly, I find that proceedings such as this one under § 5851 of the ERA are not barred by the existence of or suspended during collective bargaining or NLRB grievance procedures. The law does not commit enforcement of § 5851 to those procedures. Proceedings such as this one, unlike collective bargaining grievance and NLRB procedures, are concerned not only with the rights of the employee but the protection of

the public safety and the integrity of the process by which the public safety is assured. In another ERA case it was stated:

The employee protection provision involved in this case thus serves the dual function of protecting both employees and the public from dangerous radioactive substances. *Rose v. Secretary of Department of Labor*, 800 F.2d 563, 565 (6th Cir. 1986).

In the present case, Blake did file a grievance under the collective-bargaining agreement based on a belief that his seniority should have precluded his layoff. HECO and union representatives met without notice to Blake and decided that QA personnel were not part of the bargaining unit, that no seniority provisions existed and that the evaluations were a matter of management prerogative. No consideration was given to possible

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violation of § 5851, and, indeed, as noted above, the company-union group had no statutory authority to resolve § 5851 questions.

Thirdly, HECO's contention that Blake may not rely upon evidence preceding September 2, 1986 to establish violations of the ERA is considered to be without merit. The 30-day time limitation of § 5851(b)(1) pertains to the time period for the employee to file a complaint after his discharge or other alleged discrimination. What that means in this case is that Blake had to file his complaint within 30 days of his layoff, which he did. The provision does not mean that the only evidence tending to show discrimination which is admissible must occur during the 30 days before the complaint is filed. On the contrary, since employers will rarely or never explicitly admit that they have acted in a discriminatory manner, a careful review by the factfinder of all of the relevant facts and circumstances is required, regardless of when they occurred. As the Supreme Court stated in another case involving alleged discrimination, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Such "circumstantial and direct" evidence of intent is considered to be relevant to the issues presented here regardless of the time period in which the actions showing such intent occurred. Consideration will next be given to the facts of the case.

## II

Blake was a HECO quality control ("QC") inspector from May 1981 until his layoff on September 12, 1986. He was one of the most experienced inspectors of the approximately 25 QC inspectors employed by HECO at Byron at the time of his layoff. Blake had been assigned by HECO to train other inspectors, and he had trained 15 to 20 people in Procedure 20 (conduit/hanger) alone. He had scored well on performance evaluations in December 1985 and June 1986. In December 1985 Glen Ekern, Blake's lead inspector,



had given him a score of 39 and commented, "He has trained numerous personnel, rarely misses work, shows judgment and abilities." In June 1986 Ekern gave Blake a score of 38 and commented, "Enthusiastic, knowledgeable and respected inspector."

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The weight of the credible testimony is to the effect that Blake was one of the best HECO QC inspectors at Byron. A former supervisor of Blake, Thomas Ahlquist, testified that Glen Ekern or Blake were the most knowledgeable inspectors on the job site of those he supervised, including Blake, Robert Frankfather, Ekern, Dave Klink, Roger Austin and Jasper Wilson (Tr. 157-158, 161-162). When Robert Frankfather, a fellow QC inspector, heard that Blake was being laid off he said, "We are losing our best inspector" (Tr. 402). Ekern, who was Blake's lead inspector at the time of Blake's layoff, considered that Blake was "number one" in capabilities relative to the other men under him (Frankfather, Austin and Jasper Wilson) at the time of Blake's layoff (Tr. 441-442). James Fornwall, a former QC group leader in the conduit and hanger section where Blake was employed, testified that during the time he was group leader, "Blake was the best man I had out there" (Tr. 612). Scott MacPhee, another QC inspector still employed by HECO as of the time of the hearing, testified that Arley Blake and Dave Klink were the "best inspectors in the group," (Tr. 647) and later he testified that out of a named group of seven inspectors, including himself, he would rate Blake "[r]ight near the top of the group" (Tr. 668). Paul McMenemy, a former QC inspector in the HECO conduit and hanger group at Byron, ranked the other inspectors in the group, in terms of capabilities and abilities, from top to bottom, as Blake, MacPhee, Jasper Wilson, Klink, Austin and Frankfather (Tr. 979-980). John Wilson, another former HECO QC conduit inspector at Byron, testified that "Arley [Blake] was one of the best damn inspectors I have ever worked with" (Tr. 995-996).

The December 1985 and June 1986 personnel evaluation report scores for the five inspectors in the conduit/hanger group of inspectors were as follows:

December 1985 scores	Supervisor evaluation	Manager evaluation	Austin	39	39	Blake	39	38
Ekern	38	38	Wilson	35	34	Frankfather	29	29
June 1986 scores	Supervisor evaluation	Manager evaluation	Austin	36	34	Blake	38	35
Ekern	40	None	Wilson	32	32	Frankfather	32	32

(CX 7)

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It is clear from the record that Blake came into conflict with HECO management in regard to inspection procedures several times during the year before his layoff. In general, these conflicts came about because Blake was insistent upon observing what he considered to be proper inspection procedures, whereas some members of management, notably Ross Farrall,<sup>8</sup> differed with Blake because, at least in part, they were trying to expedite construction of the Byron plant.



Also, Blake played a prominent role in an NRC investigation of HECO which began in May 1986, and he voiced a number of concerns to the NRC as to the manner in which HECO was operating its QC inspection program. Some of these concerns were found to be valid by the NRC. At least some of Blake's contacts with the NRC were known to HECO management as early as May 9, 1986 when NRC personnel had their initial meeting with a group of HECO inspectors, including Blake, at the Byron site.

The third major way in which Blake came into conflict with HECO management was the fact that in August 1986 he testified against HECO on behalf of John Spencer, another former HECO QC inspector, at the "Spencer trial," another administrative proceeding under § 5851 of the ERA. (As previously noted, giving testimony in such proceedings is one of the activities specifically protected by § 5851.)

I consider that the evidence is not entirely clear that the conflicts arising from differing views on inspections procedures and Blake's participation in the NRC investigation played a major part in HECO's actions in September 1986 in giving Blake a low performance rating and laying him off.

Two considerations tending to indicate that these factors did not play a decisive part in HECO's actions were that, subsequent to most of the conflicts regarding inspection procedures, and subsequent to the May 9, 1986 meeting with the NRC, Blake received a good performance rating in June 1986, a rating with

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which he was apparently satisfied and indeed has pointed to in this proceeding as evidence that he was a good inspector, and evidence that Blake and Daniel McCarty, who later gave Blake the low performance evaluation which led to his layoff, were on good personal terms until about the time of the Spencer trial in August 1986.

The factors which may indicate that the disputes regarding inspection procedures and the occurrence of the NRC investigation may be of limited significance are that Ekern, the lead inspector who initially rated Blake in June 1986, was not part of HECO's management, and that McCarty may not have been on a high enough rung of HECO management to have knowledge of any plans which could have existed prior to the Spencer trial as to the QC inspectors who were to be laid off and those who were to be retained.

There may have been some advance indication that Blake was slated for eventual layoff even before he gave his testimony in the Spencer trial. The construction phase at the Byron site was coming to an end, and it was recognized that there would have to be significant layoffs, including layoffs of QC inspectors. HECO did intend to retain some QC inspectors to complete what remained of the construction and to help perform a possible maintenance contract which it hoped to obtain from CECO after construction was completed. Because the layoffs of QC inspectors would be extensive, it was

necessary for HECO to "cross-certify" its remaining inspectors in additional inspection procedures so that all necessary types of inspections could be performed. Although, as noted above, Blake was generally considered to be one of the best QC inspectors at the Byron site, HECO made no effort to cross-certify him in additional inspection procedures while the construction phase was winding down, which may have been an early indication that HECO intended to let him go.

The testimony of their coworkers was generally to the effect that Blake, Dave Klink and Scott MacPhee were considered three of the best QC inspectors at Byron. Whereas Blake was laid off, however, Klink and MacPhee were retained by HECO. This action by HECO would be consistent with a conclusion that HECO management considered that Blake was too independent, or insufficiently conformist, in his attitudes. There are indications in the record that Klink and MacPhee, while good inspectors, were less independent in their attitudes and more inclined to conform with

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management's wishes. MacPhee, unlike Blake, did not attend the May 9, 1986 meeting with the NRC representatives (Tr. 649). Unlike Blake, he felt that writing a DR (discrepancy report - Tr. 62) was the job of his supervisor rather than his job (Tr. 662). In this connection, it is noted that Blake's writing of DRs had been criticized by Farrall. Klink, unlike Blake, felt that it was not his position as a QC inspector to second-guess HECO engineers such as Ed Tovo (Tr. 2215), even though Tovo was not part of HECO's QA-QC staff but was part of the production staff whose work the QA-QC department was charged with inspecting. HECO cross-certified MacPhee in additional inspection procedures at various times including April 1986 and July 1986 (Tr. 642), both prior to the Spencer trial. Klink was cross-certified by HECO into additional inspection procedures at various times including April or May 1986, which was prior to the Spencer trial.

Thus, there is some evidence to suggest, but it is not clear, that events prior to Blake's testimony for Spencer and against HECO in August 1986 played a part in HECO's September 1986 actions in giving him a low performance rating and selecting him for layoff. This leads to consideration of the question whether Blake's layoff was a result of his testimony against HECO at the Spencer trial. I regard this as the central issue in this case.

### III

Blake testified at the Spencer trial on August 19, 1986. The other two inspectors who were then employed by HECO and who testified against HECO at that time were Ekern and Jasper Wilson. On or about September 3, 1986 McCarty prepared performance evaluations of Blake, Ekern, Jasper Wilson and other inspectors. The September 1986 scores of the inspectors in the conduit group were as follows:

	Supervisor evaluation (by McCarty)	Manager evaluation
Austin	29	None
Blake	21	None
Ekern	20	None
Wilson	23	None
Frankfather	31	None

(CX 7)

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At the same time McCarty recommended Blake, Ekern and Jasper Wilson for ROF. These were the three inspectors who testified against HECO. Blake and Jasper Wilson were laid off on September 12, 1986. However, Robert Larkin, McCarty's superior, who had replaced Smith as the QA/QC manager in July 1986, testified that he decided, against McCarty's recommendation, to retain Ekern because Ekern was a lead inspector.

Blake does not dispute that the needs of HECO's business dictated that it lay off some of its inspectors in September 1986 or the reasonableness of the number of inspectors laid off. However, he does contend that he was selected for layoff because of his protected activities.

Specifically, with respect to the asserted connection of his layoff with his testimony in the Spencer trial, Blake points to evidence that he was laid off despite the fact that he was a better and more experienced inspector than some of those not laid off, notably Frankfather. His evaluation scores prior to the Spencer trial were much higher than the scores assigned to him by McCarty in September 1986 just after the Spencer trial.

As tending to show the discriminatory nature of HECO's actions, Blake also points out that the three inspectors who testified against HECO received the lowest evaluation scores in the conduit/hanger group in the September 1986 evaluation and that they received almost the lowest scores in the entire group of HECO inspectors who were evaluated at that time. It is clear that the score of 21 given to Blake on the September 1986 evaluation represented a significant and sudden decrease from his previous evaluation scores of 39, 38 and 35. HECO argues that McCarty also gave other inspectors lower scores than they had been given in their previous evaluations. However the evidence clearly shows that the score that McCarty gave Blake was not only significantly lower than Blake's previous scores in terms of absolute numbers but that it resulted in his being rated significantly lower than before relative to the other inspectors.

Prior performance evaluations had been done at six-month intervals (December 1985 and June 1986), whereas the performance evaluation done by McCarty just prior to Blake's layoff was done less than three months after the previous appraisal. HECO management did not use the June 1986 performance appraisal in deciding which inspectors to lay off. Previous performance

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evaluations had routinely been done by the lead inspectors who had more first-hand familiarity than McCarty with the work of the inspectors who were being evaluated. The fact that McCarty rather than the lead inspectors performed the September 1986 evaluations constituted a departure from previous routine. Blake also points to testimony of McCarty to the effect that McCarty's recommendations for layoffs in Blake's department were not based on how many inspectors HECO needed in that department.

In making the September 1986 performance evaluations McCarty relied heavily on attitudinal factors as opposed to technical skills. Blake argues that it is inappropriate for an employer engaged in nuclear plant construction, with its potential hazards, to take the position, as HECO did in this proceeding, that all of the inspectors were duly certified as inspectors and that therefore assessment of the inspectors' technical skills on their performance evaluations is relatively unimportant. I find Blake's argument in this respect persuasive. Blake argues that the low evaluation score given him would have been more difficult for HECO to defend if the evaluation had taken account of technical skills.

I find, as stated earlier in this recommended decision, that the weight of the credible evidence supports a conclusion that Blake was one of HECO's best QC inspectors. The evidence is particularly clear that Blake was a better inspector than Frankfather, another inspector in Blake's group which HECO retained when it laid off Blake. Despite this circumstance, Frankfather was given a higher evaluation score by McCarty (31 compared to Blake's 21) and he was not selected for ROF in September 1986. Frankfather had been an inspector for less than a year as compared to Blake's five years (Tr. 403), and he had failed his initial quality assurance ("QA") examination. Although McCarty testified that Frankfather was a "bright" individual (Tr. 2686), Ekern testified that Frankfather accepted things "without question" (Tr. 444-445); MacPhee said Frankfather was "the slowest of the bunch" (Tr. 647), and John Wilson said Frankfather was "slow" and that it took him "quite a while to grasp" (Tr. 1012-1013). After hearing all of the testimony on this point, and after hearing the testimony of Frankfather, I credit the testimony of Ekern, MacPhee and John Wilson in this respect.

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Blake also asserts that prior to the Spencer trial he and McCarty had generally been on good terms personally, but immediately afterwards McCarty evidenced hostility toward Blake. McCarty denied that he was angry at Blake during the week after the Spencer trial (Tr. 103).

There was one disagreement between Blake and McCarty regarding inspection procedures referred to earlier which Dave Klink testified occurred about August 6, although Scott MacPhee more convincingly stated that it occurred sometime after his return from vacation on August 11. Blake stated that it occurred during the week after his August 19 testimony in the Spencer trial. Because of this conflict in the testimony, I do not reach a conclusion that this incident manifested a change in McCarty's attitude toward

Blake after the Spencer trial. Also, the evidence is not clear that this disagreement involved any actual hostility by McCarty toward Blake.

However, there was another incident on August 28 or 29, 1986, following the Spencer trial, in which McCarty by his manner did apparently evidence some hostility toward Blake ("surveyor incident"). Here again, the testimony of the parties is at odds as to exactly what occurred, but I consider that Blake's version is more likely to be accurate than McCarty's because of the inconsistency of McCarty's testimony regarding the incident. This incident occurred when McCarty walked with Blake and Jasper Wilson to the ESW Building, about half a mile from the trailer where McCarty worked, to see why Blake and Wilson needed a surveyor to check a conduit elevation. During the walk McCarty ignored Wilson's efforts to make conversation and walked ahead of Blake and Wilson six or eight steps, "laying her down pretty good" (Tr. 1483). After they had reached the building and discussed the problem, Blake's recollection was that McCarty did not walk back with Blake and Wilson but "just stomped off" (Tr. 1486).

There is other evidence that McCarty was angry with Blake and Jasper Wilson at the time of the surveyor incident. He testified that after he went to the building, "I started to form the opinion that they were playing games with me again" (Tr. 2711). The surveyor incident figured in inconsistent testimony which McCarty gave as to how he arrived at Blake's evaluation score. McCarty testified that the fact that Blake and Wilson had not transferred a surveyor's elevation mark from one side of a wall to the other

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side of the wall did not make him feel that they were not capable or competent (Tr. 151). McCarty stated that he gave Blake a score of "2" on the "development of technical skill" part of his evaluation which meant "required repeated instructions" (Tr. 148). He also testified in part:

Q. You felt that Blake required repeated instructions?

A. Yes.

Q. Okay. And was this instance of the surveyors mark problem an example of that?

A. No, because we had never had any meetings on or discussions about his surveying aspect before. (Tr. 148-149)

However, later McCarty contradicted his prior testimony and stated that he did take the "surveyor incident" into consideration in giving Blake a low score on the technical skill part of the evaluation (Tr. 2711).

I consider that the totality of the circumstances outlined above, without more, tend to give rise to an inference that HECO's actions in selecting Blake for layoff were motivated by retaliation for Blake's testimony against HECO in the Spencer trial. However, there are

other relevant circumstances which must be considered before a final conclusion is reached in this respect.

The following is a copy of the personnel evaluation which McCarty prepared on Blake:

HATFIELD ELECTRIC COMPANY

Personnel Evaluation Report

I. Personal Data

Name	BLAKE Arley	Payroll Number	2436
Date of Employ	10/25/79	Date of Last Review	6/86
Department	Conduit	Job Title	QC Inspector

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Description of Duties      Inspection of Conduit Installations

II. EVALUATION OF PROFESSIONALISM AND PERFORMANCE

Professional Competence	Supervisors Eval.	Manager Eval.
A. Development of Technical Skill		
B. Communication Skills		
C. Supervisory Skills		
D. Work Attitude		
E. Corporate Attitude		
F. Social Attitude		
G. Demonstrates Initiative		
H. Judgement/Self-improvement		
I. Attendance and Punctuality		
J. Supervisor's overall Impression		
TOTALS		

Justification of Supervisor's Overall Impression:

III. Recommendation:

consider for termination  
correct in areas required  
raise with peers  
promote and raise ahead of peers

IV. Signatures:

Supervisor	Date
Manager	Date
Corporate Officer	Date

As stated on the evaluation form, the justification for the score of 2 on item II J., "Supervisor's Overall Impression," was:

Cannot make objective decision. Everything has to be in black & white.  
Argumentative. Has trouble accepting decisions from superiors. Uses NRC as a threat.

Blake argues that not only was HECO's decision to prepare special evaluations of QC inspectors in September a pretext for laying off the more independent-minded inspectors but more specifically that the evaluation given Blake was prepared as a pretext for laying him off.

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At this point attention will be focused more specifically on the content of Blake's September 1986 evaluation. There are several circumstances regarding that evaluation which cast strong doubt on its bona fides.

Although McCarty wrote on the evaluation form that Blake "uses NRC as a threat," he admitted in his testimony that Blake had never used the NRC as a threat. On cross-examination he testified in part as follows:

Q. Did Mr. Blake ever threaten to go to the NRC prior to the date of that evaluation?

A. Not to my knowledge.

Q. So in fact he never threatened to go to the NRC.

A. Not to my knowledge, no sir. (Tr. 78)

McCarty tried to explain his incorrect statement on the evaluation form by stating that he was trying to inform Larkin that if Blake were to be considered for ROF Larkin should take into consideration the fact that Blake might go to the NRC (Tr. 79). Obviously, however, the statement which McCarty made on the evaluation form was untrue.

The comment, "Everything has to be in black & white," was also clearly meant to be detrimental to Blake when it was made. However, at the hearing McCarty admitted that the necessity for having everything in black and white was a good trait in a QC inspector (Tr. 314-316).

The comment that Blake was "argumentative" was also obviously originally intended to be pejorative, yet McCarty testified that this was not necessarily intended as a criticism of Blake because "many problems get resolved through constructive arguments" (Tr. 314). This testimony, in my opinion, constitutes an admission by McCarty that Blake was not unduly argumentative. In fact, McCarty testified that at the time he performed the evaluation he did not consider Blake to be a troublemaker (Tr. 223).<sup>9</sup> It may be observed at this



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point that an attitude of totally unargumentative conformity would be inappropriate in a QC inspector at a nuclear construction site in view of the duties of such inspectors under the ERA and its implementing regulations as interpreted by the courts.<sup>10</sup>

McCarty testified that he did not judge the inspectors on the basis of their technical ability in making his evaluations. He testified in part:

Q. The people responsible for performing the quality control work in the plant as inspectors all worked under your supervision, isn't that correct?

A. That is correct, sir.

Q. Are you saying you had no concern for whether or not the men were anything beyond simply certified in their procedures?

A. It is not my area of concern. Each inspector is evaluated annually by his peers and by his supervisor -- by a level 3,<sup>11</sup> to assure he is maintaining an adequate level of knowledge to keep his certification current.

Q. That is all you cared, that they were certified.

A. That is basically correct, sir. (Tr. 224)

However, "development of technical skill" was one of the factors listed in the evaluation form on which McCarty undertook to evaluate Blake and others. The contradictory nature of the testimony which McCarty gave regarding whether the "surveyor incident" affected his rating of Blake on technical skill has been referred to previously.

Another reason which McCarty gave at his deposition for his low evaluation of Blake was that Blake continued to reject certain installations which failed to contain O-rings during a period of time after the requirement for O-rings at those installations had

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been deleted from the plans (Tr. 375). However, at the hearing McCarty admitted that HECO had not been able to find any reports by Blake rejecting installations for failure to install O-rings which had been prepared after the O-ring requirement had been deleted (Tr. 240-241). Thus, it seems clear that this criticism of Blake had no basis in fact.

At the hearing certain members and former members of HECO management (McCarty, Steven Bindenagel and Farrall) also made criticisms of Blake's working habits such as alleged abuse of coffee breaks, starting out to the field late in the morning, getting ready to leave early in the evening, loafing around a brushpile and spending too much time studying the blueprints. Blake denied all of these allegations. All of the other witnesses who had opportunity to observe Blake's work habits and who testified on the point stated that they had not made these observations about Blake. These included Ekern, Blake's

lead inspector, and Klink, a current HECO employee who was called as a witness by HECO, as well as Frankfather and MacPhee.

As with several other incidents referred to during the hearing, this divergent testimony of two groups of witnesses creates a credibility problem. After hearing the testimony, observing the witnesses and studying the record, I credit Blake and those witnesses who testified that they observed no bad work habits on his part. For one thing, no mention of bad work habits was made on the evaluation form, and there is no evidence that HECO informed Blake at the time of the September 1986 evaluation and layoff that such alleged bad habits were a reason for selecting him for layoff. For another, the weight of the credible evidence indicates that Bindenagel exaggerated in his testimony the amount of time during which he was in the same construction trailer with Blake and in a position to observe him. Also, as pointed out above, McCarty's testimony was inconsistent in certain other respects, which casts doubt on his credibility as a witness. Thus, these criticisms of Blake's work habits appear to have no basis in fact.

Larkin made the determinations as to which inspectors would be laid off. He testified that his decision to lay off Blake was based on his numerical score in the evaluation prepared by McCarty and on the areas of Blake's certifications (Tr. 2446), that he prepared a termination schedule on September 8, 1986 or before and that he first became aware of Blake in a job-related

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context on September 10, 1986 when he saw Blake in his office.

If Larkin is to be believed, his decision to lay off Blake was based solely on Blake's areas of certification and on the performance evaluation and not on any other knowledge of Blake. However, Roger Austin testified, credibly, that Larkin had remarked to him on September 10, 1986 that Blake was a "troublemaker" after Blake had denied that he had signed a report that bore his apparent signature and had then repeatedly requested Larkin to show him his recent performance evaluation and Larkin had finally, reluctantly, after first saying that Blake could see it at his exit interview on September 12, shown it to him (Tr. 2746-2749). That was the first time that Larkin had talked to Blake. It would seem unusual that a supervisor would form an opinion that an employee was a "troublemaker" merely because the employee denied the authenticity of a signature and/or requested to see his performance evaluation, and it seems more likely that Larkin had some other basis for that belief.

There was at least one occasion on which Larkin's testimony impressed me as inconsistent, which was in regard to the reasons why, on December 19, 1986 he retained Roger Austin as an inspector instead of Frankfather, who was laid off on that date. Larkin testified at pages 2478-2479 of the transcript that one of the reasons that he retained Austin was that after dealing with him he formed an impression that Austin was fair in his judgment. However, at pages 2494-2495 Larkin testified that his retention of Austin

was based on Austin's *position* as a union steward rather than on his personal impressions of Austin. This latter testimony came at a point in the hearing when HECO was attempting to establish that as between Blake, Ekern and Austin, Blake would have been laid off eventually even if he had not been laid off on September 12, 1986 and that Larkin would have based this putative future decision solely on Ekern's *position* as a lead inspector and Austin's *position* as a union steward, without regard to the personal attributes of the three inspectors. This was an occasion where, in my opinion, Larkin clearly tailored his testimony to fit the occasion and in doing so contradicted himself.

Larkin's testimony that he was unaware of the substance of Blake's testimony at the Spencer trial strikes me as incredible. In fact, HECO management was intensely interested in what its

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employees were going to say in their testimony at that trial. It was common knowledge around the trailer where Blake, Ekern and Jasper Wilson worked, and where McCarty also worked, that those three inspectors were going to testify on Spencer's behalf (Tr. 1473-1474, 2205). Soon after the three inspectors received their subpoenas to testify at the Spencer trial, George Vanderhei, a vice-president of HECO and Hatfield's project manager at the Byron site, heard of it through the "grapevine" (Tr. 1839) and sent each of them a letter directing them to meet with HECO's trial counsel. Vanderhei testified that he was "interested to find out if they were going to be for Mr. Spencer or for the company" (Tr. 1841). Vanderhei apparently was present throughout the Spencer trial, and McCarty, one of Larkin's subordinates, testified on behalf of HECO at that trial. It should be noted that Vanderhei did not confine his activities entirely to production; he had also affected the QA/QC department by recommending to HECO's president the firing of Al Smith, the former QA/QC supervisor, a recommendation which was followed (Tr. 1771-1773).

I consider that both Larkin, despite his denial, and McCarty must have been aware at least in general terms that the three inspectors had testified against HECO, even if Larkin and McCarty were not aware of every detail of their testimony. The circumstantial evidence that management was aware of the nature of Blake's protected activity includes the facts that Blake had received good ratings on his performance, evaluations until just after he testified in the Spencer trial, the timing of the September 1986 performance evaluation, the misstatements made on the September 1986 performance appraisal, failure to discuss with Blake his alleged bad work habits at the time of his September 1986 evaluation and/or layoff and the specious testimony of management witnesses about Blake's alleged bad work habits and other matters. *See: NLRB-V. Mid State Sportswear, Inc.*, 412 F.2d 537, 539 (5th Cir. 1969).

It is concluded on the basis of the whole record that the weight of the credible evidence clearly indicates that HECO's decision to select Blake for layoff was caused by the fact that he testified against HECO at the Spencer trial.

The timing of the performance evaluations, the deliberate ignoring of technical skills in the evaluation process, the contrast in scores with Blake's previous evaluations both

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numerically and relatively, the low scores given to all three inspectors who testified at the Spencer trial, the retention of Frankfather who was clearly a less competent inspector than Blake and the untrue rationalizations advanced by HECO to support the low score given Blake, all point in the same direction. The inference is clear that HECO saw the impending layoffs as an opportunity to get rid of QC inspectors whom it considered disloyal to the company because of their testimony at the Spencer trial. However, what may have seemed to constitute disloyalty from a corporate standpoint in this case was protected activity under the law. The rationalizations advanced by HECO cannot disguise that it attempted to punish employees for exercising their rights to engage in activity protected under the ERA and thus attempted to subvert the integrity of the hearing process by which ERA-protected rights are safeguarded. This is not a "mixed motive" case. No other motive for Blake's selection for layoff has been shown in the record.

Although no definite conclusion has been reached that Blake's previous protected activities in regard to inspections and the NRC investigation did or did not play a significant part in HECO's decision to select him for layoff, it is unnecessary to resolve these questions. If these activities did play a part in HECO's decision, that circumstance would merely constitute further grounds for finding a violation of § 5851 in connection with the layoff.

#### IV

The next question to be addressed is whether Blake is barred from reinstatement because of asserted misstatements which he made on his job application with HECO. Blake filed his job application with HECO in 1979 (RX 1026). He listed the following information as to his education:

	Name of school	Years Attended	Year Graduated
Grade	Rock River	8	
High	Jefferson	3	

Blake did not make any entries under the heading "Year Graduated." In fact, Jefferson was a junior high school, and in the three years in which Blake attended Jefferson he attended the

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seventh grade, repeated the seventh grade and attended through most of the eighth grade (Tr. 1597-1598). I conclude that Blake did not correctly set forth his educational level in his job application. However, in the spring or summer of 1983 Blake noted that HECO's records showed him as having gone to the tenth grade, and he told a supervisor, Al Koca, that he had only gone to the eighth grade. At that time Koca told him that it did not matter and that a high school education was not required for a quality control supervisor, although it was recommended (Tr. 2855-2856).<sup>12</sup> Although Blake had advised Koca of his correct educational level in 1983, HECO took no action based on the employment application at that time, and it does not claim that the misstatements on Blake's employment application played any part in the low score which McCarty gave Blake in his September 1986 performance evaluation or in HECO's decision to select him for layoff. The inaccuracy of the employment application was not stated in HECO's prehearing statement of issues as a reason why Blake should not be ordered reinstated to his former job, and it was brought up by HECO for the first time during the hearing. However, under all the circumstances, including the facts that Blake himself voluntarily called attention to the error in 1983, HECO's apparently condoning of the error at that time and HECO's failure to list the matter as an issue in response to the administrative law judge's prehearing order, it is considered that HECO may not now employ this circumstance as a means of avoiding issuance of an order directing Blake's reinstatement.<sup>13</sup>

## V

In view of the whole record, I find that HECO's actions in selecting Blake for layoff, and in laying him off on September 12, 1986, were violative of § 5851 of the ERA and give rise to a right by Blake to the remedies provided by that section, including reinstatement. However, reinstatement would be meaningless if Blake were to be immediately laid off again on the grounds that he did not possess the necessary certifications as an inspector. Thus, effective reinstatement requires that HECO take action to cross-certify Blake in additional inspection procedures.

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Accordingly, IT IS HEREBY RECOMMENDED that an order be issued providing that Hatfield Electric Company is to:

1. Reinstatement Arley Blake to the position of quality control inspector which he held prior to September 12, 1986, at the same grade and at the same rate of pay which he would have received if he had continued to be employed.
2. Cross-certify Blake in additional inspection procedures including but not necessarily limited to Procedures 9, 23 and 30.
3. Cease discrimination against Blake in any manner with respect to his compensation, terms, conditions, or privileges of employment because of actions by him to carry out the

purposes of the Energy Reorganization Act of 1974, as amended, or because of is participation in this proceeding.

4. Retain Blake in his position as long as Hatfield employs any other quality control inspector at the Byron Station, absent good cause for his discharge. "Good cause" as used in this paragraph shall not include any reduction-of-force except Hatfield's permanent elimination of all quality control inspectors at Byron Station.

5. Pay Blake back pay, in an amount to be determined by the Secretary of Labor, consisting of the amount of wages he would have earned from the date of his layoff to the date of his reinstatement, less any applicable setoffs.

6. Reimburse Blake for all costs and expenses, including attorneys' and witness fees, reasonably incurred by him in connection with this proceeding, as determined by the Secretary.

Charles W. Campbell  
Administrative Law Judge

#### **[ENDNOTES]**

<sup>1</sup> Although the transcript appears to be a complete transcript of the hearing, there are gaps in the pagination. There are no pages numbered 672 through 900, inclusive, or 1112 through 1399, inclusive. Thus, the transcript consists of pp. 1-671, 901-1111, and 1400-2951. An order issued on February 9, 1987 by the judge who was previously assigned to the case noted that the complainant had waived any right to a speedy decision which right is not reasonably consistent with the timetable for submission of briefs.

<sup>2</sup> This statement of issues is adapted from the parties' joint prehearing statement of position filed on February 10, 1987.

<sup>3</sup> DR's are discrepancy reports (Tr. 62); NCR's are nonconformance reports (Tr. 62, 457); and OIR's are open inspection reports (Tr. 60-61).

<sup>4</sup> See Tr. 6-7 for discussion relating to whether animus on the part of HECO was subject to proof by circumstantial evidence.

<sup>5</sup> September 2, 1986 was 30 days before the date on which Blake filed his complaint with the Secretary of Labor which initiated this case.

<sup>6</sup> The following abbreviations will be used: CX - Complainant's Exhibit; RX - Respondent's Exhibit; ALJX - Administrative Law Judge Exhibit; Tr. - Transcript of hearing.

<sup>7</sup> It is considered that the Mackowiak and Kansas City cases were decided in accordance with the intent Congress in promulgating the ERA and that those cases constitute the

weight of authority. However, it should be noted that a more restrictive view of the employee protection provisions of § 5851 was set forth by one court of appeals in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).

<sup>8</sup> Farrall was an employee of Energy, Inc. on loan to HECO and served as QC supervisor at the Byron site from December 1985 to August 1986. He was the supervisor of Daniel McCarty, the assistant QC supervisor in charge of the mechanical group of inspectors, which included Blake's conduit/hanger group of inspectors, whose lead inspector at most of the times relevant herein was Glen Ekern.

<sup>9</sup> However, John Wilson, a former QC inspector and coordinator of the nuclear work request program at Byron, testified that Al Smith, the former QA/QC supervisor who left in July 1986, apparently as a result of the NRC investigation, had asked him after the May 9, 1986 NRC meeting for his opinion as to whether Arley Blake and Jasper Wilson were troublemakers. According to John Wilson, he refused to answer the question but told Smith his opinion that Blake was "one of the finest inspectors you have" (Tr. 1000-1001).

<sup>10</sup> HECO argued that Larkin considered only Blake's numerical score on the evaluation, and not McCarty's comments, in determining to lay him off. This argument avails HECO nothing, in my opinion. Obviously, the negative comments help explain why the low numerical scores were given and thus are inseparable from the numerical scores for purposes of this proceeding.

<sup>11</sup> At this point the witness was referring to a "level III" inspector. See Tr. 643-644 for testimony as to duties of level III inspectors.

<sup>12</sup> In 1983 Blake received a G.E.D. (high school equivalency diploma).

<sup>13</sup> It is also noted that Bindenagel, a member of HECO management who presented testimony on behalf of HECO, gave conflicting testimony as to whether he, Bindenagel, was a journeyman electrician (Tr. 2098-2099, 2927, 2937-2938), and that a fellow employee, Dennis Conour, presented testimony, which I credit, to the effect that Bindenagel was not a journeyman electrician (Tr. 2941-2942). Apparently, therefore, Bindenagel signed an incorrect "certification package" (CX 80) as an inspector in which he represented to HECO that he was a journeyman electrician.